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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

UNITED BISCUIT COMPANY OF AMERICA, UNION BISCUIT DIVISION, a Corporation,

Petitioner,

vs.

No. 575

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

WALTER S. [illegible]
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UNITED BISCUIT COMPANY OF AMERICA, UNION BISCUIT DIVISION, a Corporation, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. .....

PETITION FOR WRIT OF CERTIORARI.

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petition of United Biscuit Company of America, Union Biscuit Division, for Writ of Certiorari, directed to the United States Court of Appeals for the Eighth Circuit, to bring before the Supreme Court of the United States the case of National Labor Relations Board, Petitioner, v.

United Biscuit Company of America, Union Biscuit Division, Respondent, No. 14,829.

Your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

A. Procedural History.

This case arose out of unfair labor practice charges filed August 10, 1951, on behalf of Local Union No. 611, International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, A. F. L., against this Petitioner[1] (Transcript 1-3). In due course and pursuant to proper procedure, a complaint was issued by the General Counsel of the National Labor Relations Board through the Regional Director for the Fourteenth Region, St. Louis, Missouri, on April 8, 1952 (Transcript 1-7), and after a hearing on April 21 and 22, 1952, Trial Examiner Herman Marx issued his Intermediate Report (Transcript 1-20) finding that this Company "had engaged in" certain unfair labor practices and recommended an order that the Company cease and desist therefrom. Exceptions to the Intermediate Report were filed (Transcript 1-14) and in due course the Labor Board adopted the Report and entered its Decision and Order based thereon (Transcript 1-17). On April 27, 1953, the Labor Board petitioned the United States Circuit Court of Appeals for the Eighth

1 In the official Transcript of Record prepared by the Clerk of the Eighth Circuit Court of Appeals filed herewith, the official "Record" originally filed by the National Labor Relations Board containing the proceedings before it, consisting of 48 pages, has been inserted in its original form and renumbered merely "1". Therefore, references in this petition to the Board's Record will be made thus: (Transcript 1-22), which would designate page 22 of the Board's Record which is Part 1 of the Transcript. Similarly, the Appendix to Respondent's Brief, containing 63 pages of testimony before the Board, is numbered "2" in the official Transcript and references thereto will read: (Transcript 2-34), and references to the Board's Appendix will read: (Transcript 3-10). There is no page 4 in the official Transcript. The remaining pages 5 through 33 are numbered consecutively in the normal manner.

Circuit for enforcement of its order (Transcript 1-43). After hearing, that Court of Appeals entered its Opinion and Decree enforcing the Board's Order (Transcript 7). Your Petitioner's Petition for Rehearing (Transcript 17) was denied by that Court of Appeals on December 10, 1953 (Transcript 31).

B. The Specific Unfair Labor Practices Involved.

The complaint filed by the Board originally charged that this Petitioner was guilty of four violations of the Act:

(1) Threatening that those who joined the Union would not be promoted to supervisory positions. (2) Threatening to close the plant to discourage the employees from engaging in concerted activities. (3) Interrogating employees and (4) Soliciting withdrawals from the Union. It is extremely significant to note that even the Trial Examiner completely exonerated this Petitioner of the first two charges listed above, which were the only charges alleging threats or intimidation, and thereafter this case concerned only the two remaining charges on which the Trial Examiner and the Board found against this Petitioner. (See opinion of Court of Appeals, Transcript, page 8, enforcing the Board order.)

C. The Facts Involved.

This Petitioner is engaged in the manufacture, sale and distribution of bakery products with a plant in St. Louis, Missouri, employing about 500 employees. While the 20 route salesmen are not organized, the 355 production employees, and the 12 drivers have been represented by Locals of the Teamsters Union for as long as 20 years. Petitioner also has union contracts with eight other unions outside of St. Louis. The relationship between the Petitioner and the Unions representing its employees has been excellent, with no filed grievances, and no evidence of any

controversies with or hostility or animosity toward any of these unions (Transcript 2-49). There is no evidence or allegation of any anti-union background or hostility toward unionism of any kind whatsoever on the part of the Petitioner. All of the activity complained of by the Board must be considered against a background of a friendly, cooperative, and peaceful relationship between Petitioner and the unions representing its employees in which employees openly and freely discussed unionization with management representatives without fear of reprisals or discrimination (Transcript 2-17).

In July, 1951, the same Teamsters Local No. 611 which represented petitioner's drivers and had bargained with the Company for them for many years, undertook to organize the 20 route salesmen. These salesmen voluntarily discussed the campaign with Petitioner's President, Mr. Kennedy, and in response to their questions he devoted part of a Saturday sales meeting to outlining the comparison between their wages and working conditions and those prevailing at competitor's plants (Transcript 2-17). After the meeting several of the salesmen wanted to discuss the matter further with Kennedy, but since he was tired, he promised to meet with them the following week (Transcript 2-61). In interviews the following week, Kennedy asked them how they felt about the matter discussed at the Saturday meeting. A typical response was that of Witness Berry that "with no encouragement whatever from Mr. Kennedy" he had "personally and wilfully" decided that he did not wish to be represented by any local (Transcript 2-58, 59). Several of the men, after stating their opinion orally, wrote written statements to the same effect. Two of the men who before talking to Kennedy had independently decided to withdraw union authorizations previously given, asked Kennedy for assistance in how to word the letters they had already decided to send (Transcript 2-58, 59, 62).

Your Petitioner pointed out in its Brief to the Trial Examiner that several Courts of Appeals had repeatedly held that in the absence of an anti-union background, or other evidence of hostility toward unions on the part of an employer, interrogation of employees is not in and of itself a "per se" violation of the Act. The Trial Examiner replied in his Intermediate Report that "with every respect for the Courts which decided these cases", the Board has nevertheless continued to hold to the contrary that interrogation "is per se violative of the Act irrespective of the existence of other evidence of coercion" (Transcript 1-34) and accordingly found Petitioner had, therefore, violated the Act. Substantiating the Trial Examiner's statement that the Board did not acquiesce in the cited Court decisions, the Board adopted his findings and conclusions and entered its Order based thereon. The Eighth Circuit Court of Appeals, though advised of the decisions of First,[2] Second,[3] Sixth,[4] and Seventh[5] Circuit Courts of Appeals rejecting the doctrine that interrogation is "per se" a violation of the Act, nevertheless ordered enforcement of the Board's Order based on that doctrine.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code, providing for review by this Court, by Certiorari, of cases in the United States Courts of Appeals. This case was properly before the United States Court of Appeals for the Eighth Circuit on the Petition for Enforcement of an Order of the National Labor Relations Board pursuant to Section 10 (e)

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2 NLRB v. Brown Company, 160 Fed. (2) 449 (1 Cir.).

3 NLRB v. Montgomery Ward & Co., Inc., 192 Fed. (2) 160 (2 Cir.).

4 NLRB v. Tennessee Coach Co., 191 Fed. (2) 546 (6 Cir.);
NLRB v. Superior Co., Inc., 199 Fed. (2) 39 (6 Cir.).

5 NLRB v. Arthur Winer, Inc., 194 Fed. (2) 370 (7 Cir.);
Sax v. NLRB, 171 Fed. (2) 769 (7 Cir.);
John S. Barnes Corp. v. NLRB, 190 Fed. (2) 127 (7 Cir.).

of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 141 et seq.).

On November 19, 1953, the United States Court of Appeals for the Eighth Circuit handed down its opinion enforcing the order of the National Labor Relations Board. Within the time specified by the rules of that Court, Petitioner filed its Petition for Rehearing, which was denied on December 10, 1953. Petitioner has exhausted every opportunity for review by the Eighth Circuit Court of Appeals. On motion of Petitioner, that Court has stayed issuance of a certified copy of its Decree (dated December 10, 1953) until February 4, 1954, pending this application for a Writ of Certiorari. Petitioner filed and presented this petition, together with brief in support thereof, and the record, to this Court on February 4, 1954, which is within ninety days from December 10, the date of the Decree sought to be reviewed.

QUESTIONS PRESENTED.

1. Where the record discloses harmonious relations between the employer and unions and union members, and discloses no evidence of any anti-union background, no pattern or course of conduct hostile to unionism, and no implication of coercive purpose on the part of the employer, is not the decision of the Eighth Circuit Court of Appeals which adopts and approves the National Labor Relations Board's so-called "Per Se Doctrine," that "interrogation by an employer of an employee concerning the latter's union activities or his attitude toward unionization is per se violative of the Act irrespective of the existence of other evidence of coercion," clearly erroneous and in direct conflict with the decisions of the First, Second, Sixth and Seventh Circuit Courts of Appeals which have repeatedly rejected the same "Per Se Doctrine" in **NLRB v. Brown Co.**, 160 Fed. (2) 449 (1 Cir.); **NLRB v. Mont-**

gomery Ward & Co., Inc., 192 Fed. (2) 160 (2 Cir.); **NLRB v. Tennessee Coach Co.**, 191 Fed. (2) 546 (6 Cir.); **NLRB v. Superior Co., Inc.**, 199 Fed. (2) 39 (6 Cir.); **NLRB v. Arthur Winer, Inc.**, 194 Fed. (2) 370 (7 Cir.); **Sax v. NLRB**, 171 Fed. (2) 769 (7 Cir.); and **John S. Barnes Corp. v. NLRB**, 190 Fed. (2) 127 (7 Cir.)?

2. Where an employer has a record of friendly, cooperative, and harmonious relations with unions and union members, and there is no evidence that the employer has an anti-union background or has pursued a course of conduct hostile to unionism, does not the decision of the Eighth Circuit Court of Appeals which adopts and approves the National Labor Relations Board's "Per Se Doctrine," that employer interrogation of employees is per se violative of the Act irrespective of the existence of other evidence of coercion, impinge on the right of free speech guaranteed in Section 8 (c) of the Act and the First Amendment to the Federal Constitution and directly conflict with the contrary decisions of the Second and Sixth Circuit Courts of Appeals in **NLRB v. Montgomery Ward & Co., Inc.**, 192 Fed. (2) 160 (2 Cir); and **NLRB v. Superior Co., Inc.**, 199 Fed. (2) 39 (6 Cir.)?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Eighth Circuit Court of Appeals in this case has rendered a decision which is in direct conflict with the decisions of at least four other Circuit Courts of Appeals on the same matter, namely, the validity of the National Labor Relations Board's so-called "Per Se Doctrine" which the Eighth Circuit Court of Appeals has adopted and approved in this case while the same Doctrine has been repeatedly and consistently rejected by the First, Second, Sixth and Seventh Circuit Courts of Appeals.[6]

6 See cases cited under heading "Questions Presented—No. 1," supra.

2. The Eighth Circuit Court of Appeals has rendered a decision in this case which is in direct conflict with the decisions of at least two other Circuit Courts of Appeals on a second matter; namely, the scope and application of the right of free speech guaranteed by Section 8 (c) of the National Labor Relations Act, as amended, and the First Amendment to the Federal Constitution which the Eighth Circuit Court of Appeals has held does not apply to this type of case while the Second and Sixth Circuit Courts of Appeals have specifically held that the same type of employer activity is protected thereby.[7]

3. Both of the above questions decided by the Eighth Circuit Court of Appeals in conflict with the decisions of other Circuit Courts of Appeals are important questions of federal law subject to widespread recurrent litigation which have not been, but should be, directly settled by the Supreme Court of the United States.

4. The effect and validity of the National Labor Relations Board's "Per Se Doctrine" is of extreme importance to all employers in the conduct of their labor relations. Under the decisions of the First, Second, Sixth, and Seventh Circuit Courts of Appeals, referred to above, it was clear that mere interrogation by an employer of an employee concerning union activity did not constitute an unfair labor practice in violation of the Act in the absence of some anti-union background, or course of conduct hostile to unionism which could provide the coercive element necessary to transform otherwise innocent and innocuous conduct into the type of activity which the Act is designed to prevent. The Board's repeated attempts to justify its "Per Se Doctrine" has been consistently rejected by the Courts. Now one Circuit has adopted that Doctrine and no employer can predict whether statements he might make and questions he might ask during an organizational

[7] See cases cited under heading "Questions Presented—No. 2," supra.

campaign are protected free speech and not even evidence of an unfair labor practice under Section 8 (c) of the Act as previous cases have held, or will constitute an unfair labor practice per se under the Board's controversial Doctrine. The resolution of the conflict which now exists is of extreme importance to all employers subject to the Act, and, therefore, involves a matter of great general interest rather than merely the rights of this Petitioner.

Wherefore, for the reasons herein stated, Petitioner prays that this Court grant the issuance of the Writ.

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BRIEF IN SUPPORT OF PETITION.

THE OPINION BELOW.

The opinion below of the Eighth Circuit Court of Appeals appears at pages 7-13 of the Transcript of Record. It is reported at 208 Fed. (2) 52 (Advance Sheets).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code, providing for review by this Court, by certiorari, of cases in the Circuit Courts of Appeals. This case was properly before the Eighth Circuit Court of Appeals on the National Labor Relations Board's Petition for Enforcement pursuant to Section 10 (e) of the National Labor Relations Act, as amended. The jurisdictional statement in the Petition, page 5, is more detailed, and is incorporated here by reference.

THE QUESTIONS PRESENTED.

The questions presented are fully stated in the Petition annexed hereto, page 6, and are incorporated herein by reference. In substance, they present two questions of general interest and importance:

A. Resolution by this Court of the conflict between the decision of the Eighth Circuit Court of Appeals herein, and the contrary decisions of the First, Second, Sixth and Seventh Circuit Courts of Appeals concerning the validity of the National Labor Relations Board's controversial "Per Se Doctrine" (Cases cited in the Petition, pages 6-7).

B. Resolution by this Court of the conflict between the decision of the Eighth Circuit Court of Appeals herein and the contrary decisions of the Second and Sixth Circuit Courts of Appeals concerning the application of Section 8 (c) of the "Taft-Hartley" Act and the First Amendment to the Federal Constitution to employer interrogation of employees in the absence of any anti-union or otherwise coercive background (Cases cited in Petition, page 7).

SUMMARY OF ARGUMENT.

I. The holding of the Eighth Circuit Court of Appeals that the activity of the Petitioner disclosed by the record was in and of itself violative of the National Labor Relations Act, as amended, even in the absence of any anti-union background or course of conduct hostile toward unionism on the part of Petitioner, is in conflict with the decisions of the First, Second, Sixth and Seventh Circuit Courts of Appeals which specifically rejected the Board's "Per Se Doctrine."

II. This holding by the Eighth Circuit Court of Appeals treats certain statements by the Employer as evidence of an unfair labor practice contrary to the provisions of Section 8 (c) of the Taft-Hartley Act and the First Amendment to the Federal Constitution and in conflict with the decisions of the Second and Sixth Circuit Courts of Appeals on the same subject.

III. These conflicts between the various Courts of Appeals on the interpretation of federal legislation present an incongruous situation. This Court should grant certiorari and resolve the conflicts so that harmony of decision may prevail, and correct a situation where different conclusions are possible in different Circuits on the same factual situation.

IV. This is not a problem personal to this Petitioner alone but involves interpretation of federal legislation of widespread interest and importance to all employers subject to the provisions of the National Labor Relations Act, as amended. Whether employer activity of a frequently occurring nature which has heretofore been held non-violative of the Act and protected as free speech is now to be considered as per se violative of the Act is a matter of undoubted general importance.

ARGUMENT.

I. The Decision of the Eighth Circuit Court of Appeals Is in Conflict With the Decisions of Four Other Circuit Courts of Appeals Concerning the Validity of the National Labor Relations Board's "Per Se Doctrine".

The Board decision and order which the Eighth Circuit Court of Appeals has found is entitled to enforcement, held that this Petitioner committed only one violation of the National Labor Relations Act. "By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8 (a) (1)" (Transcript 1-40).

The actual wording of that Section of the Act is:

> "Section 8 (a). It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7".

While it is true that under certain circumstances, such as in a background of demonstrated hostility toward unions, an employer's questions may amount to "interference, restraint, and coercion", it is equally clear that the Act does not prohibit interrogation of employees as an unfair labor practice per se. Nevertheless, in spite of the absence of any authority for such an interpretation in the language of the Act, the National Labor Relations Board developed, announced, and followed a theory known as the "Per Se Doctrine" that mere interrogation of employees by an employer, standing alone and without any additional evidence of coercion, constituted a violation of Section 8 (a) (1) of the Act. That Doctrine was clearly and expressly at issue before the Board in the case of **Montgom-**

ery-Ward & Co., Inc. (1951), 93 NLRB 640, where the Board held:

> "(We have) consistently held that questioning of employees as to any aspect of union activity is per se violative of Section 8 (a) (1) of the Act."

On petition for enforcement of the above order, the Second Circuit Court of Appeals specifically rejected this Board Doctrine. **NLRB v. Montgomery-Ward & Co., Inc.,** 192 Fed. (2) 160 (2 Cir.). It is important to note that the surrounding circumstances in the Montgomery-Ward case were much stronger in providing a potential anti-union background for the interrogation involved than those in the present case. There an employee named Victor was a known union organizer. Mrs. Victor's discharge by Montgomery Ward was held to be discriminatory in violation of Section 8 (a) (3) by the Court. The store manager had called an employee, Scordo, to his office and asked her if she had received a union application blank. When she replied she had, the manager told her, with reference to Victor, "When there is a rotten apple in the bushel, well, naturally, we try to get the rotten apple out before they all turn rotten," and he said, "When a person has T. B. or some sort of disease they isolate them." To another employee, Stuckey, the manager said, "I want you to stay away from Mrs. Victor and her gang. I'm going to fire her if it's the last thing I do." The manager also asked employee Shaffer to point to him another employee who had talked to her about joining the union, and asked employee Krott about what it would mean if the union was in the store.

The above facts from the Montgomery Ward case are briefly noted to point out the type of background in which the Court considered the Board's "per se doctrine." In rejecting that doctrine the Second Circuit Court of Appeals said:

"But inquiries made by the manager concerning what was being done in behalf of the union, and statements as to his not liking the union, to the extent that they constituted no threat or intimidation, or promise of favor or benefit in return for resistance to the union were not unlawful, particularly after the 1947 Amendment to the Act found in Section 8 (c). (Citing cases.) Therefore, the statements of the kind made by the manager to Shaffer and Krott, without more, did not violate the Act. And the statements made to employees Scordo and Stuckey violated this section only insofar as the references to Victor constituted implied threats to discharge anyone engaging in union activity."

The Court then said, concerning the Board's cease and desist order:

"It is too broad in that part forbidding mere interrogation of employees as to union activities, and consequently it is modified . . . "

The Board's "Per Se Doctrine" has been similarly and unanimously rejected by three other Circuit Courts of Appeals. We will not burden the Court with a long discussion of the Specific facts involved in each case, but think it is sufficient to say that each involved facts which provided some evidence that could be considered as indicating an anti-union attitude on the part of the employer, as contrasted to the present case, which presents no such background. Nevertheless, each of these Circuit Courts of Appeals rejected the Board's "Per Se Doctrine," just as the Second Circuit did in the Montgomery Ward case. The language used by these Courts is clear and emphatic.

First Circuit: **NLRB v. Brown Co.**, 160 Fed. (2) 449, 456.

"Nevertheless, it seems to us pertinent to note that there has come to our attention no case involving acts of supervisory officials in which a Court has enforced

or affirmed a cease and desist order of the Board except cases in which there was either a record of hostility toward the outside union, or else evidence of discriminatory discharges or of active solicitation by supervisors, or some other pointed indication of the employer's anti-union sentiment."

Sixth Circuit: **NLRB v. Tennessee Coach Co.**, 191 Fed. (2) 546, 555.

"Before inquiries as to union membership and statements by employers or supervisory employees can be held to be unfair labor practices they must be shown to have some relation to the coercion or restraint of the employees in their right of self-organization. None of the inquiries and statements made by the supervisory employees in this case were of such a character as to form any reasonable basis for the conclusion that they proceeded from an anti-union policy of the company and interfered with such rights of employees. * * * The company's background was one of harmonious relations with union members and with unions."

Sixth Circuit: **NLRB v. Superior Co., Inc.**, 199 Fed. (2) 39, 44.

"The evidence does not disclose any threat or attempt at coercion. The incident was not part of any general pattern of interrogating employees generally about union affiliation and activities. In our opinion, such limited interrogation, justified by the acts of the employees themselves, was not a violation of the Act."

Seventh Circuit: **John S. Barnes Corp. v. NLRB**, 190 Fed. (2) 127, 130.

"We are unable to agree with the Board in this conclusion. We recognize, of course, that spying on union activities and threats of reprisals against em-

ployees engaging in such activities may amount to the coercion which is forbidden by Section 8 (a) (1) of the Act. **R. R. Donnelley & Sons Co. v. NLRB**, 156 F. (2) 416, certiorari denied 329 U. S. 810. The circumstances there were that for thirty years the company had a 'consistent, persistent, vigorous opposition to labor unions' . . .

"However, the courts have not considered isolated remarks or questions, which did not in themselves contain threats or promises, and where there was no pattern or background of union hostility, as coercion of the employees and as a violation of Section 8 (a) (1) . . .

"In the instant case, the words themselves are necessary to establish the possible existence of espionage instead of there first being established the existence of espionage which lent significance to the otherwise harmless words.

"Here there was no anti-union background or pattern of conduct hostile to unionism. In the instant case the attitude and actions of the employees seems clearly to negative the idea that the company was hostile towards the union or was attempting to coerce the employees . . .

"If the company was attempting to coerce its employees by threats, it is evident that the employees were not aware of it."

Seventh Circuit: **NLRB v. Arthur Winer, Inc.**, 194 Fed. (2) 370, 372.

"In the instant case, with no anti-union background nor pattern of conduct hostile to unions, the questions and remarks of Winkler and Winer cannot be considered as violations of the Act."

Seventh Circuit: **Sax v. NLRB**, 171 Fed. (2) 769, 773.

"**No case has been cited and we know of none holding the view asserted by the Board here.** The cases

cited by the Board all involved a course of conduct of which the interrogatories as to membership and activity in a union were only part of the whole picture. In none of them did the mere words of inquiry stand alone." (Emphasis added.)

The above language of the Court in the Sax case is as true today as it was then—no Court has approved the "Per Se Doctrine" asserted by the Board, except the Eighth Circuit Court of Appeals in the present case here sought to be reviewed by certiorari through this petition.

There can be no doubt that the decision in the present case adopts and approves the Board's "Per Se Doctrine" in enforcing the Board's order. The fundamental basis of the Board order involved is specifically stated in its own opinion. While feigning respect for the decisions of the Courts quoted above, the Board nevertheless ruled that:

> "* * * the Board has held in many cases that interrogation by an employer of an employee concerning the latter's union activities or his attitude toward unionization is **per se violation of the Act irrespective of the existence of other evidence of coercion**" (Transcript 1-34).

The same theory was advanced by the Board in its Brief and reiterated in its oral argument before the Court below. Thus it was clear that the Board realized that the complete absence of any anti-union background, the total lack of any manifest antagonism or hostility to unionism on the part of this employer, the long history of harmonious employer-union relations, and the lack of any evidence of coercion or intimidation in the employer's relations with his employees, made it necessary for them to rely on the "Per Se Doctrine" as the only possible justification for their decision in this case. The opinion of the Eighth Circuit Court of Appeals below recognizes the absence of any coercive background capable of transforming other-

wise uncoercive statements or activity into intimidating conduct violative of the Act. Therefore, the Court below had to adopt the "Per Se Doctrine" in order to reach its decision to enforce the Board's order.

The evidence in this case shows: (1) no evidence of anti-union background or hostility; (2) over twenty years of harmonious relations with unions and union members; (3) free discussion of all subjects, including unions, by employer and employee begun by the employee; (4) repeated specific expressions by the employer that the employee was entirely free to make his own choice concerning union membership; (5) complete absence of any statements by the employer which are coercive in and of themselves; and (6) testimony by the employees themselves that they acted of their own free will and certainly did not feel in any way coerced.

Under such circumstances it is clear that the opinion of the Court below is erroneous and in direct conflict with the decisions of four other Courts of Appeals as quoted above. This petition for certiorari should therefore be granted so that this Court may thereby resolve the conflict.

II. The Decision of the Eighth Circuit Court of Appeals Is in Conflict With the Decisions of Two Other Circuit Courts of Appeals Concerning the Effect of the Guarantee of Free Speech Contained in Section 8 (c) of the Act and the First Amendment to the Federal Constitution.

The guarantee of free speech contained in Section 8 (c) of the Taft-Hartley Act provides not only that certain activity shall not constitute an unfair labor practice, but also that it shall not even be evidence of an unfair labor practice. That Section reads:

> "8 (c) The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in

written, printed, graphic, or visual form, shall not constitute **or be evidence of an unfair labor practice** under any of the provisions of this sub-chapter, if such expression contains no threat or reprisal or force or promise of benefit." (Emphasis added.)

It is important to re-emphasize at this point that the Trial Examiner immediately exonerated this Petitioner of the only two charges that alleged threats or coercion and that such charges never re-entered the case. Even the Court below recognized this fact (Transcript 8) and further stated in its opinion that although Petitioner's president, Mr. Kennedy, advised the salesmen that "he was not favorable to unionizing their group" he also made it clear "that they could join or not join the union as they pleased, and he made no threat of reprisal should they do so" (Transcript 11). It is therefore beyond question that Kennedy's statement that he was not "favorable" to unionization of these particular men contained no threat of reprisal or promise of benefit. This is precisely the kind of statement guaranteed by Section 8 (c) of the Act. It cannot constitute an unfair labor practice and **it cannot even be evidence of an unfair labor practice!**

But the opinion of the Court below proceeds to hold that the activity of the Petitioner "was **under the circumstances** an attempt to influence by intimidation the employees in a matter of labor organization" (Transcript 13). The only "circumstances" surrounding Petitioner's activity cited by the Court below to justify this conclusion are that the employees "knew that Kennedy was opposed to unionization" and that there was then pending a representation petition before the Board (Transcript 12). Certainly there was nothing coercive about the pending Board hearing, so the only remaining "evidence" to supply the element of intimidation found by the Court is Kennedy's statement that he was not favorable to unionization for these men.

It is submitted that the Court's reliance on such "evidence" to support its finding that Petitioner committed an unfair labor practice is directly contrary to the clear wording of the statute that such statements cannot be evidence of an unfair labor practice!

Such decision by the Court below is in direct conflict with the opinions of the Second and Sixth Circuit Courts of Appeals. In **NLRB v. Montgomery Ward & Co., Inc.**, 192 Fed. (2d) 160, 163, on facts described above, the Second Circuit Court of Appeals said:

> "But inquiries made by the manager concerning what was being done in behalf of the union, **and statements as to his not liking the union,** to the extent that they constituted no threat or intimidation, or promise of favor or benefit in return for resistance to the union, were not unlawful, particularly after the 1947 amendment of the Act found in Section 8 (c)." (Emphasis added.)

Also in conflict with the opinion of the Court below, but in accord with the Second Circuit decision quoted above, is the opinion of the Sixth Circuit Court of Appeals in **NLRB v. Superior Co., Inc.**, 199 Fed. (2d) 39, 43:

> "But inquiries unaccompanied by threats of reprisal, express or implied, and without relation to coercion or restraint of the employees in their right of self-organization are not violative of the Act. NLRB v. Tennessee Coach Co., supra, 6 Cir., 191 Fed. (2d) 546, 555. **Section 8 (c) of the Act, as amended, permits the employer to express his views about the disadvantages of joining a union if unaccompanied by threats or coercion.** (Citing case.) In the present case, the Respondent did not require the four employees to divulge information about their union affiliation which they had not already freely given." (Emphasis added.)

That the statements here involved are also protected by the First Amendment to the Federal Constitution is evident from the opinion of this Court in **Thomas v. Collins**, 323 U. S. 516, 537, 65 S. Ct. 315, 89 L. Ed. 430, 444:

> "Accordingly, decision here has recognized that employers' attempt to persuade to action with respect to joining or not joining unions are within the First Amendments guaranty. (Citing cases.) . . . When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been surpassed. But short of that limit the employer's freedom cannot be impaired."

It is submitted that the opinion of the Court below does impair the freedom guaranteed by the First Amendment and Section 8 (c) of the Act because it treats statements which come within those guaranties as evidence of an unfair labor practice, in fact, as the only evidence to provide a coercive element. Such decision is in direct conflict with the decisions of the Second and Sixth Circuit Courts of Appeals quoted above. This Court should, therefore, grant certiorari in order to correct this error and resolve the conflict.

III and IV. **These Conflicts Between the Decisions of the Court Below and Those of the Other Circuit Courts of Appeals as to the Interpretation of Important Federal Legislation Concern Matters of General Importance Affecting All Employers and Issues Arising in Recurrent ~~Legislation~~ Litigation.**

The cases cited in this Brief as being in conflict with the opinion of the Court below, while numerous, represent only a few of the cases that could be cited on the same subject. The great number of cases which reach the Courts suggest the still greater number that are disposed of in earlier stages of procedure. This is, therefore, not

an isolated case but one of frequently recurrent nature, and the resolution of the conflicts described will be noted with extreme interest by all employers subject to the provisions of the Act.

At present, the doubt as to the validity of the Per Se Doctrine and the effect of free speech guaranties on the type of activity here involved, creates an incongruous situation where the same employer acts may be held violative of the Act in one Circuit and non-violative in other Circuits. Surely this case presents the type of situation in which this Court should exercise its supervisory and harmonizing functions through review by issuance of the Writ of Certiorari as prayed.

For the reasons stated, Petitioner prays that this Court grant its application for the issuance of the Writ of Certiorari to the end that harmony may prevail between the decisions of the various Circuit Courts of Appeals concerning this important and frequently litigated federal legislation.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 575

UNITED BISCUIT COMPANY OF AMERICA, UNION BISCUIT DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 7-13) [1] is reported at 208 F. 2d 52. The findings of fact, conclusions of law, and order of the National Labor

[1] The symbol "R." refers to proceedings before the court below. The symbols "R. I.," "R. II." and "R. III." refer, respectively, to the Record as printed for the court below, the Appendix to the brief of the respondent below (petitioner here), and the Appendix to the Board's brief below. Occasional references to the typewritten transcript of testimony are designated by the symbol "Tr."

Relations Board (R. I. 17-42) are reported at 101 NLRB 1552.

JURISDICTION

The judgment of the court below was entered on December 10, 1953 (R. 13). The petition for a writ of certiorari was filed on February 4, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding, approved by the court below, that petitioner in violation of Section 8(a) (1) of the Act interfered with, restrained and coerced its employees in the exercise of their rights under the Act by systematically interrogating them concerning their views on union organization and soliciting their written disavowals of support for the union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 12-14.

STATEMENT

A. The Board's findings of fact

Following the usual proceedings under the Act, the court below approved the Board's findings that petitioner had violated Section 8(a)(1) of the Act by interrogating its employees about their attitude

toward the Union,[2] soliciting written disavowals from them of union sentiment, and soliciting and assisting employees to cancel the Union's authority to bargain for them. The subsidiary findings of fact may be summarized as follows:

1. *The individual interviews of employees following petitioner's disapproval of the Union*

Petitioner, a Delaware corporation, maintains office, plant and distribution facilities in St. Louis, Missouri. By July 15, 1951, petitioner had learned of the Union's effort to organize about 20 of its metropolitan area route salesmen who comprised petitioner's Divisions A and G (R. I. 24; R. II. 16). Soon after learning of the Union's activities, petitioner's local manager, Union Biscuit Division President Charles E. Kennedy, attended a joint "sales" meeting of the route salesmen in the two divisions (R. I. 24; R. II. 15, 16). The chief topic of this meeting was union activities, the ordinary business being "cut a little short" (R. I. 24, 25; R. II. 44).

Kennedy opened the meeting by asking the assembled salesmen to join him in a "straightforward discussion" of the Union and its organizing activities (R. I. 24; R. II. 16, 17). After telling them that they had a right to join, or to refrain from joining, the Union, he discussed petitioner's wage and commission scales, and other employee benefits, comparing them with similar compensation scales effective for route salesmen employed

[2] Local 611, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL.

by two of petitioner's competitors (R. I. 24; R. II. 17, 18, 19). Kennedy warned the employees not to rely too heavily on the Union's promises of better pay and working conditions, observing that petitioner would "have a voice in this thing, we are not just going to turn it over to 611 or to any other union * * *. The Company still reserves the right to manage the business." He added, "There might be some shutdowns * * *. I am not threatening in this * * * but there might be because we couldn't get together with the union on some understanding" (R. I. 24; R. II. 19, 20). He reminded the employees that petitioner had closed its Toledo plant: "We had high wages there, it was an unprofitable plant and the company finally decided to close it" (R. I. 24, 25; R. II. 20, 21, 22).

During the week after the sales meeting, Kennedy's secretary summoned about 15 of the 19 salesmen then employed in Divisions A and G to private interviews with Kennedy in his office (R. I. 25, 33; R. II. 26, 27). Most of the interviews followed a fixed pattern (R. I. 25, 26; R. II. 27). Kennedy testified that he told each salesman "[You] were at the meeting last week and * * * you heard * * * what I said and the general discussion * * *. You have probably talked this over and you have talked to the other men * * *. How do you feel about it?" (R. I. 26; R. II. 28.) According to Kennedy, "In every case, without exception, everyone of them said that they wanted no part of [the Union], they didn't feel it was necessary and they said when it come up to vote, that I knew

how they would vote * * * simply for no union" (R. I. 27; R. II. 28, 29, 40, 41).

The salesmen were not dismissed after giving Kennedy oral assurance of their anti-union sentiments. In each case, Kennedy testified, he "asked them if they would care to put that in writing on their own free will without any promises, or urging them or anything" (R. I. 27; R. II. 40). From eight to ten of the employees were willing to do so (R. I. 28; R. II. 37, 38, 40, 41).

According to Kennedy, not all of the salesmen who were willing to give him written statements were able to express themselves. Kennedy showed these inarticulate employees a sample statement he had prepared some time earlier (R. I. 27; R. II. 41; R. III. 7). He insisted that he did not allow any of the salesmen to copy his sample statement because, as he said, "I didn't want to be incriminated by letting them have it to digest * * *" (R. I. 27; R. II. 42).

Kennedy kept the statements and his own draft for several weeks, then destroyed the documents because he felt, "after studying it over," that he "shouldn't even have them" (R. I. 28; R. II. 38; R. III. 10-11).

2. *The withdrawals from the Union*

Kennedy's interrogation of employees Ferguson and Berry did not follow the exact pattern of the other interviews, for both of these employees admitted to Kennedy that they had given the Union

bargaining authority (R. I. 28, 29, 30; R. II. 31, 32, 47, 48, 57, 58, 62).

Immediately after the sales meeting, employee Ferguson requested an interview with Kennedy, but they did not meet until the following week (R. I. 25, n. 8, 33; R. II. 31, 61, 62). This interview, Kennedy testified, began with his asking Ferguson the questions asked of the other employees (R. I. 30; R. II. 32). During the interview, Ferguson told Kennedy that he had "signed something with the union," but that he would vote against the Union and wished to withdraw his authorization (R. I. 29, 30; R. II. 32, 62). Kennedy then showed Ferguson "a piece of paper"—apparently the sample statement used in the other interviews—and suggested that Ferguson prepare a letter revoking the bargaining authorization he had given to the Union (R. I. 29; R. II. 48; R. III. 15). Ferguson did so, with some additional aid from Kennedy (R. I. 29; R. II. 33, 63; R. III. 15) After Kennedy had approved the "phrasing" of the letter, Ferguson gave it to Kennedy's secretary to be mailed (R. I. 29, 30, 31; R. II. 32, 33, 63; R. III. 3, 15, Tr. 145, 146).

The interview with employee Berry was much the same. Berry was told to come to Kennedy's office (R. I. 25; R. II. 34; R. III. 14). When he reported, Kennedy asked him what he thought about the Union and whether he had talked with any union organizers. Berry replied that he had, and that he had signed an "application," adding upon further questioning, "I had a long time to consider things over * * * [and] felt different

* * *. I don't feel that I need anybody to argue my points for me * * *. (R. I. 30; R. II. 57, 58, 60; Tr. 138.) Kennedy asked Berry if he would care to write a statement to that effect. Berry agreed to do so, but because he did not know what to say in his statement Kennedy showed him a statement written by "one of the other boys" (R. I. 30; R. II. 59, 60). With that as a precedent, Berry prepared his withdrawal from the Union. He left it, with postage, to be mailed by Kennedy's secretary (R. I. 30, 31; R. II. 35, 58, 59, 60; R. III. 3, 4).

The statements of Ferguson and Berry were thereafter sent to the Union by Kennedy's secretary (R. I. 31; R. II, 38, 39).

B. The Board's conclusions and order

The Board concluded that, by interrogating its employees concerning their views as to union organization, by soliciting, requesting and assisting employees to prepare written statements of their attitude toward the Union, and by soliciting, requesting, and assisting employees to withdraw their union designations, petitioner interfered with, restrained and coerced the employees, in violation of Section 8(a) (1) of the Act, in the unconstrained exercise of the organizational rights guaranteed by Section 7 of the Act (R. I. 18, 39, 40, 41). Accordingly, the Board ordered petitioner to cease and desist from the unfair labor practices found and from abridging in any other manner the exercise by employees of the rights guaranteed them by Section 7 of the Act (R. I. 18-19). Affirma-

tively, the order requires petitioner to post appropriate notices (R. I. 19).

C. Judgment of the court below

The court below concluded that, taking into consideration "all the facts and surrounding circumstances," the Board's findings were adequately supported by the record as a whole, and enforced the Board's order in full (R. 7-16).

ARGUMENT

The decision below, approving the Board's finding that petitioner violated Section 8(a)(1) of the Act by systematically interrogating three quarters of the employees involved concerning their views as to union organization, presents no question warranting review by this Court. As petitioner does not dispute, employer interrogation of employees concerning their union activity and interest, when it passes the limits of non-coercive, casual, and isolated inquiry, constitutes a prohibited infringement of the employees' statutory right to engage in concerted activities free from employer interference or restraint. "When that limit is passed, judicial precedents are unanimous that a violation of Section 8(a) (1) may be found." *National Labor Relations Board* v. *Syracuse Color Press, Inc.*, 33 LRRM 2334, 2336 (C.A. 2, decided January 5, 1954).[3]

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[3] Illustrative recent cases in the Courts of Appeals are listed below by circuit:

First Circuit: *National Labor Relations Board* v. *Saxe-Glassman Shoe Corp.*, 201 F. 2d 238, 242.

Second Circuit: *National Labor Relations Board* v. *Chau-*

The court below, taking into consideration "all the facts and surrounding circumstances" of the instant case—including the systematic and wholesale character of the interrogation undertaken by a top-ranking management official, who had previously informed the employees of his opposition to the Union, and petitioner's solicitation of written disavowals by the employees of union sentiment—agreed with the Board, rightly we submit, that the interrogation in this setting carried a coercive thrust and constituted an "inhibitory weapon" proscribed by the Act. The conclusion of the court below thus raises only a question of substantial evidence, and this Court does not normally undertake to assess the sufficiency of the evidence supporting Board findings. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 491; *National Labor Relations Board* v. *Pitts-*

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tauqua Hardware Corp., 192 F. 2d 492, 494; *Precision Fabricators, Inc.* v. *National Labor Relations Board,* 204 F. 2d 567, 569.

Third Circuit: *National Labor Relations Board* v. *Kanmak Mills, Inc.*, 200 F. 2d 542, 543.

Fourth Circuit: *National Labor Relations Board* v. *Southland Mfg. Co.*, 201 F. 2d 244, 245.

Fifth Circuit: *National Labor Relations Board* v. *Stratford Furniture Corp.*, 202 F. 2d 884, 886-887.

Sixth Circuit: *National Labor Relations Board* v. *F. H. McGraw & Co.*, 206 F. 2d 635, 640.

Seventh Circuit: *National Labor Relations Board* v. *Jackson Press, Inc.*, 201 F. 2d 541, 545.

Eighth Circuit: *National Labor Relations Board* v. *Cold Spring Granite Co.*, 208 F. 2d 163, 165.

Ninth Circuit: *National Labor Relations Board* v. *W. T. Grant Co.*, 199 F. 2d 711, certiorari denied, 344 U. S. 928.

Tenth Circuit: *National Labor Relations Board* v. *Tri-State Casualty Ins. Co.*, 188 F. 2d 50, 53.

burgh Steamship Company, 340 U. S. 498, 502-503.

The different results in the decisions cited by petitioner do not stem from any differences in principle, but are attributable solely to the circumstance that "they differ factually from the instant case. They exemplify the casual, perfunctory, non-hostile interrogation by minor supervisory employees" which has been held permissible. *National Labor Relations Board* v. *Syracuse Color Press, Inc., supra*, 33 LRRM at 2336. Nothing in those cases suggests that a program, like the one here, of private interviews with employees and interrogation concerning their views on union organization, coupled with solicitation of written disavowals of union sentiment, is to be treated as innocuous and is therefore to be disregarded.[4]

---

[4] Petitioner's claim that the coercive character of the interrogation could not, consistent with Section 8(c) of the Act, be appraised in the context of the surrounding circumstances, such as petitioner's expressed opposition to the Union, finds no support in the cases, including those cited by petitioner (Pet. 15-18). In addition to those cases, see, *National Labor Relations Board* v. *Syracuse Color Press, Inc., supra; National Labor Relations Board* v. *Fulton Bag and Cotton Mills*, 175 F. 2d 675, 676-677 (C.A. 5). The decisions recognize "that words are not to be looked at in a vacuum, but in the light of all the circumstances surrounding their utterance," *National Labor Relations Board* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445, 448 (C.A. 9).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1954.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression con-

tains no threat of reprisal or force of promise of benefit.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuits courts of appeal to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate

temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modfied, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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